Employment Standards TRIBUNAL

An appeal

- by -

Chart Canada Corporation ("Chart") and
Chart Canada Group Services Inc. ("Group")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2010A/59

DATE OF DECISION: July 19, 2010

DECISION

SUBMISSIONS

Bruce Ryan	on behalf of Chart Canada Corporation and Chart Canada Group Services Inc.
Tami Zaranski	on her own behalf
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), filed by Bruce Ryan ("Mr. Ryan") on behalf of Chart Canada Corporation ("Chart") and Chart Canada Group Services Inc. ("Group") of a determination that was issued by a Delegate of the Director of Employment Standards (the "Director") on July 15, 2009 (the "Determination"). The Determination found that Chart and Group were associated corporations pursuant to section 95 of the *Act* and jointly and severally liable to pay Tami Zaranski ("Ms. Zaranski") the following amounts: regular wages of $6,684.53, compensation for length of service of $2,615.44, annual vacation pay of $558.00 and accrued interest of $177.25 on the said amounts. The total award to Ms. Zaranski in the Determination is $10,035.22.

2. The Determination also levied an administrative penalty of $500.00 against Chart and Group pursuant to section 29 of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the "*Regulation*").

3. On May 3, 2010, Mr. Ryan filed the Appeal Form wherein his name appears as the person making the appeal. He explains in the fax cover to the Appeal Form that the Appeal Form was "inadvertently left incomplete" when he earlier, on April 23, 2010, filed the appeal of the Determination by submitting his written submissions. It is also important to note that in the earlier written submissions, he represented that Chart Canada Business Services (BC) Inc. ("Business Services") was appealing the Determination, although the Determination is not against the latter. While Business Services may be an active and related corporate entity to Chart and Group, the Determination is not against Business Services and the latter is therefore not the proper party with standing to appeal. Having said this, in a subsequent communication with the Tribunal, an email dated July 17, 2010, Mr. Ryan states "while all three of these companies (Chart Canada Corporation, Chart Canada Group Services Inc. and Chart Canada Business Services (BC) Inc) are related entities it is Chart Canada Business Services (BC) Inc. that employed Ms. Zaranski" and the appeal he filed is on behalf of all three. I reiterate that Business Services was not a named party in the Determination and has no standing to appeal but I acknowledge that Mr. Ryan also meant to appeal for Chart and Group from the outset but failed to describe them specifically in the appeal form or submissions. However, neither Ms. Zaranski nor the Director have suffered any prejudice as a result of Mr. Ryan's error and I propose to treat the appeal on its merits as if Mr. Ryan, from the start, had properly described Chart and Group as the appellants.

4. In the Appeal Form, Mr. Ryan has checked off the "error of law" and the "natural justice" grounds of appeal. As for remedies, Mr. Ryan is asking the Tribunal to either cancel or vary the Determination. The written submissions of Mr. Ryan suggest that he is more probably seeking a cancellation of the Determination, as I am unable to identify in his submissions his explanation of how he wants the Determination varied except that he wants the Determination to apply to Three Point Properties LLP ("Three"), Ms. Zaranski's employer prior to her transfer to Chart.

5. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in the *Act* (pursuant to s. 103) and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this Appeal can be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the reasons for the Determination.

ISSUES

6. Did the Director err in law or breach the principles of natural justice in making the Determination?

FACTS AND FINDINGS IN THE DETERMINATION

7. On May 1, 2008, Mr. Ryan ("Mr. Ryan"), who acted in a position similar to a comptroller for Three, a property development business in Victoria, British Columbia, hired Tami Zaranski ("Ms. Zaranski") as Senior Accountant for Three. In this position, Ms. Zaranski reported directly to Mr. Ryan and she also received direction from the main principal of Three, Jack Julseth ("Mr. Julseth"), and Three's Chief Financial Officer, Dave Craig ("Mr. Craig").

8. Ms. Zaranski's annual compensation, as Senior Accountant, consisted of a salary of $75,000 plus $10,000 in four (4) quarterly bonuses of $2,500 for a total pecuniary compensation package of $85,000.

9. As concerns her vacation entitlement, Ms. Zaranski was entitled to three (3) weeks' paid holiday in the first year of her employment with Three. However, at or around the time of her hire by Three, she advised her employer, particularly Mr. Craig, that she and her husband liked to travel and take some extensive holidays and she had already planned an extensive vacation to the Middle East but was prepared to work extra hours to make up for the extra time away from work. There developed, as a result, an understanding with Three that any extra time worked by Ms. Zaranski would be considered as banked time, allowing her the flexibility of using the banked time for additional vacation time with no corresponding deduction in pay. According to Ms. Zaranski, Mr. Craig advised her that as long as her work was getting done, this was not problematic for him or Three.

10. Subsequently, in January, 2009, Three issued Ms. Zaranski a Record of Employment terminating her employment, but explaining in the comments section of the document the following as the reason for the termination of employment: "new company formed + staff moved to new company". The new company was Chart. According to Mr. Ryan, Three and Chart had entered into an agreement wherein Chart hired the accounting employees of Three and agreed to provide accounting services to Three. As a result, all accounting staff of Three, together with Ms. Zaranski, continued working for Chart. According to Ms. Zaranski, this was to facilitate direct billing of accounting services and related work pertaining to projects of Three.

11. The transition of her employment from Three to Chart was seamless according to Ms. Zaranski, as all accounting staff of Three carried on working for Chart for the same wages and in the same roles and at the same location. No new offers of employment or job descriptions were provided to any employees by Chart. Mr. Ryan also continued working with Chart and continued to supervise Ms. Zaranski as before. The only differences were that the source of the payment of the employees' salaries now changed from Three to Chart and the latter instituted a system of tracking monthly and subsequently weekly hours worked by employees, which was not done with Three. Mr Ryan, as a result, now received the daily records of hours worked by the employees of Chart.

12. At the Hearing of her Complaint, Ms. Zaranski stated that the hours of work of the accounting staff consisted of 7.5 hours per day and 37.5 hours per week, although her hours of work were irregular based on the workload. She stated she normally started work at approximately 7:30 a.m. and normally took a one-half-hour to one-hour lunch break, but would often eat at her desk while working. She indicated that her hours of work above 7.5

hours per day were banked and taken as extra paid vacation and that as with Three before, in her employment with Chart she intended on taking an extended vacation in 2009 and using her banked hours to do so without deduction in her pay.

13. Ms. Zaranski provided the Delegate with copies of numerous emails she sent to Mr. Ryan throughout 2009 wherein she included a copy of her daily and weekly hours of work and spreadsheets detailing billing information and daily assignments. This information also tracked hours of work, whether they were regular hours or overtime hours. In particular, the weekly spreadsheets she produced indicated a running total of the number of hours accrued in the overtime bank. This information was provided to Chart and Group prior to the Hearing. While Mr. Ryan acknowledged that he received regular timesheets from Ms. Zaranski in 2009 and did not dispute that she worked extra hours, he stated that the normal daily hours of work for Chart's employees were not formalized and he was rather easygoing when it came to tracking time and did not care about the specifics so long as the work was done.

14. When the relationship between Chart and Three did not work out and was terminated, some, but not all, employees of Chart returned or transferred back to Three. Ms. Zaranski was not one of the transferred employees. Instead, in May 2009, she received from Chart eight (8) days verbal notice of the termination of her employment. Thereafter, on June 6, 2010, Chart issued her a Record of Employment in which it noted May 31, 2009, as her last day of work and noted a shortage of work as the reason for the termination of her employment with a further note that she would not be returning.

15. In addition to the verbal notice of the termination of her employment, Ms. Zaranski was paid two (2) days of severance pay and her full vacation payout of 6% of her gross wages for 2009.

16. In her Complaint against Chart and Group, Ms. Zaranski indicated that she was expecting to receive extra pay for her banked time because she was unable to take that time off with pay in light of the termination of her employment. It was Ms. Zaranski's contention that she would not have agreed to work the extra time if there was not an understanding or agreement that she would receive extra compensation for it.

17. In her Complaint against Chart and Group, Ms. Zaranski, in addition to claiming overtime wages based on the daily time records contained in her monthly reports totalling 153.35 hours, also claimed compensation for length of service pursuant to section 63.

18. At the Hearing of her Complaint, the Delegate identified the issues requiring a determination as follows:

1. Is Ms. Zaranski owed eight (8) days of compensation for length of service and did her length of service include the time she spent with her original employer, Three?
2. Is Ms. Zaranski owed either overtime wages or regular wages for extra hours worked?
3. Is Ms. Zaranski a manager under the *Act* and, if so, is she owed regular wages for extra hours worked? If so, what wages are owed to her?
4. Are Chart and Group associated corporations under the *Act*?

19. With respect to the matter of the length of service, the Delegate noted in the Determination that Chart terminated Ms. Zaranski's employment with eight (8) days verbal notice and a payment of two (2) days of severance pay. Chart, presumably, was topping up of the two (2)-week notice period under section 63 of the *Act* with the two (2) days payment. However, according to the Delegate, the *Act* in section 63 is clear in requiring a written notice of termination. Therefore, the Delegate concluded that Ms. Zaranski was not provided proper notice under section 63 of the *Act* when she was given verbal notice.

20. The Delegate then considered Ms. Zaranski's length of service under the *Act* to determine the appropriate period of notice she would be entitled to. In this regard, the Director considered section 97 of the *Act*, which provides for the continuation of employment when the employees are transferred from one employer to another. According to the Delegate, the language of section 97 is very broad and does not simply refer to the sale of the business but also the disposal of "all or part of a business or a business' assets". The Delegate considered the definition of "disposal" in the *Interpretation Act*, which definition reads "transfer by any method and includes assign, gift, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things". According to the Delegate, the accounting employees of Three were transferred to Chart, and that transfer was seamless in that one day they were working as Three's employees and the next day they were doing the same work as employees of Chart, at the same offices, using the same tools and equipment, and performing the same work. The Delegate noted that the Records of Employment issued to these employees, including Ms. Zaranski, confirmed this fact. The Delegate also noted that the employees of Three were a significant asset of the business and provided valuable accounting services, first to Three and subsequently to Chart. In these circumstances, the Delegate concluded that section 97 applied and Ms. Zaranski was therefore employed in excess of one (1) year under the *Act* when she was terminated. She was thus entitled to two (2) weeks written notice of the termination of her employment. However, since she only received two (2) days severance pay and not any written notice, she was owed an additional eight (8) days of pay as compensation for length of service.

21. With respect to the second question; that is, whether Ms. Zaranski was owed either overtime wages or regular wages for extra hours worked, the Delegate considered the question of whether Ms. Zaranski was a "manager" as managers are excluded from the requirement to be paid overtime wages pursuant to section 34(f) of the *Regulation*. At the Hearing of the Complaint, both Mr. Ryan and Ms. Zaranski adduced much evidence regarding the status of Ms. Zaranski and the scope of her duties and responsibilities. The Delegate, after reviewing all of the evidence and considering the totality of Ms. Zaranski's duties and responsibilities and authority in her position as Senior Accountant of Chart, concluded that Ms. Zaranski was a "manager" under the *Act* and therefore excluded from the requirement to be paid overtime wages. I need not review all of the evidence leading to that Determination as the matter of the characterization of Ms. Zaranski as a "manager' under the *Act* is not the subject of this appeal. However, it should be noted that the Delegate, having concluded that Ms. Zaranski was a manager, went on to conclude that Ms. Zaranski may nevertheless be entitled to be paid for all hours worked, including the extra hours she claimed to have worked, if the terms of her employment provided for payment for extra hours worked. The Delegate then went on to observe that such evidence existed in this case as Ms. Zaranski told Three and later Chart that she expected to take extra time off, in addition to the three (3) weeks of paid vacation to which she was entitled, to travel as she and her husband liked to travel extensively. The Delegate also noted that Mr. Ryan, in 2008 when Ms. Zaranski was employed with Three, approved the extra time off she took and appeared to recognize the informal arrangement in place regarding the extra time she took off, although her hours of work were not tracked. The Delegate also noted that in her employment with Chart, she recorded her daily hours in 2009 and in an email to Mr. Ryan on April 27, 2009, she noted that she was planning on taking off a significant number of extra banked hours she was accumulating and Mr. Ryan confirmed in his return email on the same date that the extra vacation days she was intending to take were approved for her 2009 vacation. This information, together with Mr. Ryan's confirmation in a further email on February 29, 2009, that the normal work days for accounting office staff were 7.5 hours per day and his subsequent acknowledgement in the cross examination at the Hearing that the normal office hours were 7.5 hours per day, led the Delegate to conclude, on the whole, that, notwithstanding that there was not a specific agreement between the parties that the extra hours worked by Ms. Zaranski were going to be banked or paid at overtime premiums, there was an informal understanding between the parties that Ms. Zaranski would be able to take the extra hours she worked as "lieu time as one hour paid time off for each one hour of extra time worked". Further, the Delegate also concluded that but for the termination of her employment, Ms. Zaranski would have been paid extra wages for the extra hours she worked as paid time off. As a result, the Delegate concluded that Ms. Zaranski was owed regular wages for the extra 153.35 hours worked. The Delegate then went on to determine Ms. Zaranski's wages owing based

on her annual income of $85,000.00, which consisted of $75,000.00 of base pay plus the $10,000.00 of bonus, which was blended into her total income. She was paid her bonus together with her base pay on a monthly basis commencing February 2009 in her employment with Chart, according to the evidence adduced at the Hearing.

22. With respect to the final issue of whether Chart and Group were associated corporations pursuant to section 95 of the *Act*, the Delegate observed that Chart is a 100% wholly owned subsidiary of Group, and the sole Director and Officer of both Chart and Group is Michael Anthony Adamek ("Mr. Adamek"). As a result, the Delegate found that Chart and Group were under common control and direction and, therefore, in order to facilitate the enforcement of minimum employment standards, there was a need to treat the two (2) corporations as associated under the *Act*.

SUBMISSIONS OF CHART AND GROUP

23. Mr. Ryan, in his written submissions on behalf of Chart and Group, submits that the Delegate erred in law in applying the "time bank rules" and failed to apply "the law under the [Act's] definition of associated corporations". I will, under separate sub-headings below, summarize the gist of Mr. Ryan's submissions.

(i) Time Bank Rules

24. Mr. Ryan submits that pursuant to section 42(1) of the *Act*, it is at the "written request of an employee" that an employer may establish a time bank for the employee. However, in this case, there was no evidence of a "written document showing such an agreement" and therefore, according to Mr. Ryan, this failure should be treated similarly to the failure of Chart to provide written notice of employment termination to Ms. Zaranski. In other words, Mr. Ryan says that there should be consistency in the application of the *Act*. The lack of a written request to establish a time bank, therefore, should be dealt with in the same manner as the verbal notice of termination argues Mr. Ryan. The result Mr. Ryan is arguing for is that there should be no recognition of any banked time by Ms. Zaranski.

25. On a related note, Mr. Ryan submits that the Delegate calculated the time banked by Ms. Zaranski by simply looking at her period of employment with Chart, and not Three. However, in the case of the calculation of her notice period, he states the Delegate considered Ms. Zaranski's employment periods with Three and Chart. Mr. Ryan is again arguing for what he calls consistency in the application of the *Act* because he submits that Ms. Zaranski is in a deficit position with the time she took off from Three relative to the time she banked with Three. In his view there would be a full offset of her banked time with Chart against her deficit with Three such that Ms. Zaranski's claim for banked time with Chart would fail. However, no evidence of any precise deficit with Three was adduced at the Hearing and it is not contained in the Section 112(5) record in this appeal.

26. Mr. Ryan also submits that there was improper reliance by the Delegate on the timesheets adduced in evidence at the Hearing to calculate Mr. Zaranski's claim for banked time as the timesheets were generated only for billing clients and not for tracking time worked by employees for time banking purpose. Further, he states that there was no agreement, verbal or in writing, to allow for the use of the said timesheets for the purpose of banking time and thus they should not be considered by the Delegate for calculating time banked.

27. Mr. Ryan also disputes the Delegate's finding that he did not dispute the overtime hours of Ms. Zaranski at the Hearing. He states that the delegates said finding is incorrect. He submits that in the Reasons for the Determination, the Delegate has overlooked that Ms. Zaranski "also took excessive time away that was not tracked properly" or "recorded in the billing sheets or…signed off by anyone". He also reiterates that there was no written agreement for creating a time bank for Ms. Zaranski.

28. Mr. Ryan also disputes the Delegate's calculation of wages owed to Ms. Zaranski based on her wage rate of $85,000.00 per annum. Mr. Ryan states that Ms. Zaranski's income was $75,000.00 per annum, plus a bonus based on "a review that was done regularly that determined [Ms. Zaranski's] eligibility for the bonus". While he notes that she met the criteria for a bonus each time and was paid a bonus, "the bonus was not a guaranteed part of her pay". In these circumstances, Mr. Ryan argues that any calculation of an amount owing to Ms. Zaranski "must be determined using her rate of pay that was in writing", namely $75,000.00 base salary.

(ii) Associated Corporations

29. While Mr. Ryan does not appear to dispute the Delegate's finding pursuant to section 95 that Chart and Group are associated firms, he argues that Chart was effectively "controlled and managed by Three" although "Chart had separate directors and officers". According to Mr. Ryan, based on the following factors he lists, the Determination should be against Three and not Chart:

- Ms. Zaranski hired Trisha Smith ("Ms. Smith") pursuant to the direction of Three's Mr. Julseth.
- Ms. Zaranski "followed directions of [Mr. Julseth]".
- "Chart's client base was 99% companies associated with and controlled by Three".
- Ms. Zaranski responded to Mr. Ryan, who is neither an owner or a director of Chart, and did not at any time respond to "requests from Chart's owners, directors and officers".
- Ms. Zaranski held regular meetings directly with key people at Three and took daily directions from them.
- Mr. Ryan met with key people at Three on a daily or a regular basis and obtained directions from them.
- Chart was set up primarily for the benefit of Three and this was explained to the employees of Chart and "the owners and director of Chart did not at any time benefit from the operations of Chart".
- Mr. Julseth of Three met with Mr. Ryan and Ms. Zaranski to explain how he no longer could afford the services of Chart and this led to the demise of Chart.
- After Chart ceased its operations, Three took over the employment of most of the employees of Chart, which, according to Mr. Ryan, had the effect of reversing the creation of Chart five (5) months earlier.
- Mr. Julseth instructed Chart who to hire and when Mr. Ryan was unsure about hiring an employee, Mr. Julseth would weigh in on the decision and express who he expected Chart to hire.

30. For the above reasons, Mr. Ryan concludes that Three, and not Chart, should be subject to the Determination.

31. I also note here that I have reviewed Mr. Ryan's submissions in response to Ms. Zaranski submissions delineated later in this decision and do not find them either necessary or helpful to reiterate here particularly in light of my decisions under the heading "Analysis" below.

SUBMISSIONS OF THE DIRECTOR

(i) Time Bank

32. The Director submits that there was no finding in the Determination of the existence of a time bank between the parties under section 42 of the *Act* and the latter section did not apply to the facts of this case. The Director submits that the Determination simply outlines the facts pertaining to hours of work and the conditions of employment relating to hours of work and remuneration and Chart and Group are simply re-arguing their submissions on the time bank issue which was previously considered at the Hearing.

33. With respect to the dispute about the rate of pay of Ms. Zaranski, the Director notes that the Determination explained that Ms. Zaranski's remuneration, at the start of her employment, consisted of an annual base pay of $75,000.00, plus $10,000 in bonus with the latter payable in equal amounts ($2,500) quarterly. While the original offer letter from Three noted that the bonus would be based on Ms. Zaranski meeting production targets, no evidence was adduced at the Hearing as to what the production targets were. However, Ms. Zaranski always received her bonus payments.

34. Subsequently, in mid-February 2009, Chart rolled the quarterly bonus into Ms. Zaranski's salary. Payroll records provided by Chart evidenced Ms. Zaranski's bi-monthly salary increased from $3,125.00 to $3,541.67. The difference in the bi-monthly salary of $416.67 accounted for the bonus that was rolled into the monthly salary of Ms. Zaranski. Further, the payment of $833.33 to Ms. Zaranski on February 29, 2009, was a payment for the pro rata portion of the bonus for the month of January 2009 and constituted wages as defined under the *Act*.

35. According to the Director, the bonus component of Ms. Zaranski's wages was not a gratuitous payment by Chart and formed a part of her annual income. Therefore, the Delegate according to the Director properly calculated the calculation of the wages in the award made in the Determination, based on the annual income figure of $85,000 inclusive of bonus.

(ii) Associated Corporations

36. The Director submits that the appeal is the first time that Mr. Ryan has suggested that Three and not Chart is the employer of Ms. Zaranski. According to the Director, the details regarding the relationship between Chart and Three is set out in the Determination, and Three and Chart are not under common control and direction. The Director also submits that Chart became Ms. Zaranski's employer as of January 1, 2009, the starting period for Ms. Zaranski's complaint. According to the Director, the delegate's finding of continuous employment of Ms. Zaranski by Chart, pursuant to section 97 of the *Act*, does not alter the fact that Chart became her employer and Three ceased to be her employer.

SUBMISSIONS OF MS. ZARANSKI

(i) Time Bank

37. Ms. Zaranski notes that, while there was a time bank established in her employment with Chart without her written request, the time bank was valid because Chart and she mutually agreed upon it. She further submits that this is evidenced in her email dated April 27, 2009, to Mr. Ryan and in the latter's reply to that email, both of which are produced verbatim in the Reasons for the Determination by the Delegate.

38. She also notes that Mr. Ryan, during the "original mediation" and subsequently at the Hearing acknowledged that had her employment continued she would have had the opportunity to combine her vacation entitlement with

the extra time banked. She also notes that it was a standard practice for employees to work extra hours and take time off in lieu of pay. In this regard, she attached new evidence in the form of an email from a former colleague of hers at Chart, Kerri McLeod, who writes that during her employment at Chart she took time off for a personal day and worked overtime hours both before and after she took time off to make up for the time off.

39. Ms. Zaranski also challenges Mr. Ryan's submissions that during her employment with Three she had taken excessive time off which should be accounted for in determining what is owed to her by Chart. In this regard, she produces further new evidence in the form of a letter from the Chief Financial Officer of Three, Mr. Craig, who confirms in his letter that "there was no time or wages due or outstanding between Tami and Three Point Properties" as at December 31, 2008. Ms. Zaranski also repeats some evidence previously adduced at the Hearing of the Complaint, which I do not find necessary or helpful to repeat here. It is in the nature of re-argument.

ANALYSIS

40. I will analyse the appeal of the Determination under separate headings corresponding to the two grounds of appeal invoked by Mr. Ryan on behalf of Chart and Group below.

(a) Natural justice

41. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal explained the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see BWI Business World Incorporated, BC EST # D050/96.

42. In this case, I find that Mr. Ryan, on behalf of Chart and Group, has not discharged the onus on these appellants to demonstrate, on a balance of probabilities, a breach of the principles of natural justice on the part of Delegate. There is absolutely no evidence that Chart and Group were denied procedural fairness during the Hearing or at any other time. The section 112(5) record including the Reasons for the Determination appear to support the view that both Chart and Group, were aware of the case against them and through their representative, Mr. Ryan, were afforded full opportunity to present their case including challenge the evidence of Ms. Zaranski by cross examination. Therefore, I reject the appellants' challenge of the Determination based on the natural justice ground of appeal.

(b) Error of Law

43. The Tribunal has consistently adopted the definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C.A):

1. a misinterpretation or misapplication of a section of the Act;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;

4. acting on a view of the facts which could not be reasonable be entertained; and

5. adopting a method of assessment which is wrong in principle.

44. Having examined both the Determination and Mr. Ryan's submissions on appeal, I did not find that the appellants have demonstrated any error of law as defined in *Gemex Developments Corp. v. B.C.*, supra, in the Determination. With respect to the specific challenges of the appellants under the error of law ground of appeal I propose to analyze them more specifically under separate descriptive subject headings below:

(i) Time Bank

45. Mr. Ryan, on behalf of Chart and Group, appears to argue that there has been a non-compliance of section 42 on the part of Ms. Zaranski as there was no written request by her to Chart to establish a time bank. For this reason, Mr. Ryan appears to suggest that Ms. Zaranski's claim for wages for extra time worked beyond what was the norm or expected (7.5 hours per day and 37.5 hours per week) should fail. In support of his argument, Mr. Ryan points to the reasoning and conclusion of the Delegate in the Determination pertaining to Ms. Zaranski's claim for compensation for length of service. More specifically, the Delegate determined that Chart failed to provide proper termination notice to Ms. Zaranski when it provided her verbal notice of the termination of her employment when section 63 of the *Act* called for a written notice. Mr. Ryan argues that Ms. Zaranski's claim for wages should similarly fail for her failure to request her employer in writing to establish a time bank, as required under section 42 of the *Act*. However, I am not persuaded by Mr. Ryan's attempt to draw a parallel between the writing requirements in sections 42 and 63 of the *Act*. While there was never a written request by Ms. Zaranski for Chart (and previously Three) to establish a time bank for her, Mr. Ryan was aware throughout Ms. Zaranski's employment with Chart, as well previously when she was with Three, that she was working extra hours with a view to taking extra time off using her banked hours. This is evidenced in, for example, the email of April 27, 2009, from Ms. Zaranski to Mr. Ryan advising him of her intention to take extra hours off based on the extra hours she worked with year-end work she was doing for Three then. Chart, through Mr. Ryan, at all material times, was aware of the informal dealings with respect to her extra hours banked and how she intended to utilize those hours by adding to her vacation entitlement and that arrangement was further positively acknowledged by Mr. Ryan in his email as long ago as April 27, 2009, when Mr. Ryan was supervising Ms. Zaranski at Three. Therefore, in my view, Ms. Zaranski has established with sufficient evidence that there was an agreement, albeit an informal one, concerning her ability to bank time, which she could then use to add to her vacation entitlement to take extended vacations.

46. In my view, the requirement of a "written request" on the part of an employee to an employer to establish a time bank under section 42 of the *Act* is mainly for the protection of the employee so that there is evidence in writing of the employee's request that a time bank be established. It appears that Mr. Ryan, on behalf of Chart and Group, argues that the failure to make a written request by Ms. Zaranski of her employer should be used against her to deny her claim for the extra hours she worked. I do not think section 42 was meant to be used in that manner, particularly in this case where the employer, through its representative, Mr. Ryan, has acknowledged that Ms. Zaranski worked extra hours, although Mr. Ryan was not aware of the precise number of extra hours she worked.

47. In my view, section 42 of the *Act*, on the facts in this case, cannot be used to deny Ms. Zaranski's claim for extra hours she worked, which she would have received by way of extra time off had her employment carried on with Three.

48. Mr. Ryan further argues that Ms. Zaranski "took excessive time off" during her employment with Three and that time off should be offset against her extra hours worked at Chart, which would result in a full offset of her claim. I reject this argument simply because Mr. Ryan, on behalf of the appellants, did not make such an argument at the

Hearing of the Complaint and is raising it for the first time in the appeal. Furthermore, Ms. Zaranski's claim for her extra hours banked does not go beyond her employment with Chart. Therefore, any extra time off she may have taken during her employment with Three is irrelevant. Moreover, in this regard, Ms. Zaranski has produced new evidence in rebuttal in the form of a letter from the Chief Financial Officer of Three, Mr. Craig, indicating that there was "no time in wages due or outstanding between [Ms. Zaranski] and Three Point Properties".

49. With respect to the determination of wages owed to Ms. Zaranski based on her extra hours worked for Chart, Mr. Ryan argues that the Delegate inappropriately relied upon the timesheets Ms. Zaranski prepared for billing purposes, as these timesheets were not for purposes of tracking "a time bank". In Mr. Ryan's view, the extra hours recorded on the timesheets which Ms. Zaranski was banking "were never specifically approved hours worked". In my view, the timesheets constituted the best available evidence in light of Chart's failure to record any extra hours worked by Ms. Zaranski and there is nothing wrong with referring to this best evidence available when the same evidence was created in the normal course of Chart's business and there is no basis to doubt its veracity.

50. Mr. Ryan also claims that Ms. Zaranski "took excessive time away that was not tracked properly" or "not recorded in the billing sheets or ever signed off by anyone". Presumably, his argument is that the alleged excessive time Ms. Zaranski was taking off should be offset against her banked time. However, Mr. Ryan should have adduced some employer records or evidence showing when Ms. Zaranski "took excessive time away". The onus is on the employer to prove this allegation, and the employer here has failed to do so.

51. Finally, Mr. Ryan argues that the wage determination is based on Ms. Zaranski's wages of $85,000.00 per annum, and this is incorrect. According to Mr. Ryan, Ms. Zaranski's base wage was $75,000.00 per annum and there was a process of an annual review by the employer, which determined her eligibility for a bonus. However, he acknowledges that she met bonus eligibility "each time and was paid the bonus". In my view, there is no dispute here with the findings of fact made by the Delegate in the Determination that in Ms. Zaranski's original offer letter in her employment with Three, while the bonus was described as being based on meeting production targets, there was not any evidence of what those production targets were, and Ms. Zaranski always received her bonus. Subsequently, starting in mid-February 2009 when she was with Chart, Ms. Zaranski's quarterly bonus was rolled into her salary, and she was provided a higher salary on a monthly basis, which bonus and base salary totalled $85,000.00 per annum. Therefore, I do not find any error in the Delegate's calculation of wages based on the annual income of $85,000.00.

(ii) Associated Corporations

52. Section 95 of the *Act* provides:

> **Associated employers**
>
> **95** If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
>
> (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
>
> (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

53. There are four (4) pre-conditions to an application of section 95 to the circumstances in any matter before the Director, namely:

a. there must be more than one (1) corporation, individual, firm, syndicate, or association;

b. each of these entities must be carrying on a business, trade, or undertaking;

c. there must be common control or direction; and

d. there must be some statutory purpose for treating the entities as one (1) employer.

54. In this case, the Director, in my view, on the balance, appropriately determined that Chart and Group were associated corporations under section 95 based on the evidence adduced at the Hearing. More specifically, the Delegate was satisfied that there were indeed two (2) corporations, Chart and Group, in existence at all material times. While Chart, at the time the Determination was made, was not actively operating, there was a point when it did operate actively during the same period Group actively existed, as is evidence by the corporate searches of Group and Chart found in the section 112(5) record in this appeal. With respect to the "common control or direction" element of the test in section 95, the Delegate noted that Chart is a 100% wholly-owned subsidiary of Group and both Chart and Group had a single director and officer, namely Mr. Adamek. It was Mr. Adamek who provided a letter at the Hearing of the Complaint advising that he was assigning Mr. Ryan to attend the Hearing.

55. It is also telling in the contact Mr. Ryan made with the Tribunal to clarify that he was appealing the Determination on behalf of all three firms-Chart, Group and Business Services (although the latter has no standing)- that he states that "all three of these companies are related entities".

56. With respect to the final step in the section 95 test, namely, the requirement that there be some statutory purpose for treating the entities as one employer, in this case, this requirement is met since the finding that Chart and Group are associated employers was made for the purpose of enforcing the basic standards of compensation and conditions of employment and also to facilitate the collection of wages owing under the *Act* (see *Re Invicta Security Systems Corp.*, [1996] B.C.E.S.T.D. No. 340 (QL); *Re Super Shuttle Ltd.*, [2000] B.C.E.S.T.D. No. 361 (QL)).

57. As indicated by the Tribunal in *Re L. and T. Loading Ltd. and Powder King Mountain Resort Inc.*, [2001] B.C.E.S.T.D. No. 93 (QL), once a determination has been made under section 95 that two entities or firms are associated corporations, both are liable jointly and severally for the unpaid wages. In this case, the Delegate appropriately determined Chart and Group as associated corporations are jointly and severally liable for the awards made in the Determination.

58. Having said this, Mr. Ryan, in the appeal of the Determination, does not appear to focus his challenge on the Delegate's finding that Chart and Group are associated corporations under section 95, but instead, advances a new argument that the Determination should be applied to Three. This argument presumably is based on Mr. Ryan's contention that Three is an associated corporation with Chart under section 95 because Chart, he argues, was "controlled and managed by [Three]". I have reviewed the evidence Mr. Ryan submits in support of his assertion that the Determination should apply to Three and not Chart and while I find much of the evidence in support of this argument is presented for the first time and would unlikely qualify as new evidence on appeal under the test adopted in *Re Merilus Technologies Inc.*, BC EST # D171/03, I do not need to consider this issue here as Mr. Ryan's argument fails under section 2(d) of the *Act*, which provides:

Purposes of this Act

2. The purposes of this Act are as follows:

…

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;…

59. It is this statutory objective that has guided the Tribunal not to normally hear new arguments on appeal. If Mr. Ryan or Chart wanted to argue that Three was an associated corporation with Chart under section 95, this argument should have been made at the Hearing of the Complaint and not for the first time on appeal. Therefore, I reject Mr. Ryan's argument that the Determination should apply to Three and not Chart. Moreover, a determination under section 95 that two (2) entities are associated employers makes the entities liable jointly and severally for the unpaid wages, and the Tribunal has no jurisdiction to designate only one of the entities as the "only employer". Therefore, even if this Tribunal were persuaded to consider Mr. Ryan's argument (which the Tribunal is not), the Tribunal would not be in a position to cancel the Determination against Chart and apply it to Three.

ORDER

60. Pursuant to Section 115 of the *Act*, I order the Determination dated March 16, 2010, be confirmed in the total amount of $10,535.22, together with any interest that has accrued under Section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal